file for bankruptcy, and then, rarely if ever, terminate employees.[8] The bankruptcy filings and issues in this matter, in the matter of *Sacred Heart, supra*, *Boston Reg'l, I, supra*, *In Cottage Grove Hosp., supra*, *In re Memorial Medical Center*, Dkt. No. 00-61255 (Bankr. D.N.J. 2001),[9] all belie the nonchalant dismissal by the Committee of the seriousness of the issue, and the impact of the same on all States which are mandated by the FUTA to allow non-profit employers the option of either making quarterly contributions to the UC fund, or to reimburse the Fund for the unemployment benefits paid.

In this connection, Respondent's optimistic assertion that the State will get some recovery as a general unsecured creditor,[10] and therefore this case does not merit review by this Court, Opp. Brf. at p.22, is not only irrelevant, but also does not undermine the State's position that the Third Circuit's precedential decision has severely affected the very integrity and solvency of the State's UC fund, a fund held in trust solely for the payment of UC benefits.

In sum, there is a conceded lack of uniformity in deciding the precise foundational and fundamental issue of "what is a tax." This Court is being asked to resolve this issue as it impacts all 50 States and because it is required to best serve the unemployed public.

---

[8] *Cf.*, Amici Brf. at p.4 (in 2003 non-profit employers had "7.4 million" employees, and "States paid former employees ... almost a billion dollars in UC benefits...").

[9] *See, also, Amici* Brf. at pp. 4-5.

[10] Respondent does not factor in any administrative expenses (such as its counsel's fees) which, as a first-tier priority expense, will further deplete the available funds.

IV. THE THIRD CIRCUIT'S DECISION IS WRONG

Certiorari is also warranted because the decision below is wrong. The Third Circuit did not consider the UC statutpry scheme as a whole, but improperly made a selective use of statutes in arriving at its conclusion.

Thus, the court improperly overlooked N.J.S.A. 43:21-9(a) (defining the UC fund as comprising of contributions and reimbursements); N.J.S.A. 43:21-9(b); (c) (mandating that monies withdrawn from the UC trust fund be used only to pay unemployment benefits); N.J.S.A. 43:21-7.2 (d); 43:21-7(a)(1) (non-profit employers cannot deduct their obligations from the employee's salary); N.J.S.A. 43:21-3; 4; 5 (no distinction in the method of computing unemployment benefits payable to the unemployed individual); N.J.S.A. 43:21-48 (costs and assessments of maintaining the UC Fund imposed on all employers).

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,
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APPENDIX

INDEX TO APPENDIX

Page

Excerpts of Respondent's Initial Brief Filed with the Third Circuit App.1-12

App. 1

No. 03-4768
In The
United States Court of Appeals
for the
Third Circuit

RECONSTITUTED COMMITTEE OF UNSECURED CREDITORS OF UNITED HEALTHCARE SYSTEM, INC.,

Appellant,

-against -

STATE OF NEW JERSEY,
DEPARTMENT OF LABOR,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

BRIEF OF APPELLANT, RECONSTITUTED COMMITTEE OF UNSECURED CREDITORS OF UNITED HEALTHCARE SYSTEM, INC.

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POINT II

THE BANKRUPTCY COURT ERRED IN FINDING THAT THE REIMBURSEMENT OBLIGATIONS WERE A TAX UNDER ANDERSON, FEIRING, LORBER AND SUBURBAN II BECAUSE OF THE NUMEROUS NON-TAX CHARACTERISTICS OF THE REIMBURSEMENT OBLIGATIONS

Like other courts addressing the priority status of reimbursement obligations and other governmental claims, the Bankruptcy Court and the District Court employed an analysis developed under the now-repealed Bankruptcy Act of 1898 (as amended) and laid out in four cases: *State of New Jersey v. Anderson*, 203 U.S. 483 (1906), *City of New York v. Feiring*, 313 U.S. 283 (1941), *In re Lorber Industries of California (County Sanitation Dist No. 2 of Los Angeles County v. Lorber Industries of California, Inc.* , 675 F.2d 1062 (9th Cir. 1982), and *In re Suburban Motor Freight Inc., (Ohio Board of Workers' Compensation v. Yoder)* 36 F.3d 484 (6th Cir. 1994) ("*Suburban II*"). But the Bankruptcy Code of 1978, which is applicable here, expressly narrowed the applicability of those cases by limiting the type of tax claims granted priority status.

. . .

A. The Limited Efficacy of the Anderson-Feiring Test Under the Bankruptcy Code.

Anderson and *Feiring* were based on Section 64(a) of the Bankruptcy Act), *Anderson*, 203 U.S. at 487; *Feiring*, 313 U.S. at 285, which granted priority status to any "tax" the debtor owed to the government:

> The debts to have priority in advance of the payments of dividends to creditors, and to be paid in full out of bankruptcy

> estates, and the order of payment shall be ... (4) taxes which became legally due and owing by the bankruptcy to the United States or to any state or any subdivision thereof ...

Bankruptcy Act, § 64(a) *reprinted* in L. King., ed., Collier on Bankruptcy. Appendix, Volume A, Part 3(a) at App. Pt. 3 63-63. (15th ed. rev. 1996).

Because any governmental claim was entitled to priority under the Bankruptcy Act, the *Anderson-Feiring* line of cases is helpful only in determining whether a claim was a governmental claim or whether the claim belonged to a non-governmental entity. Thus, the status of the holder of the claim (governmental entity or not) determined whether a claim was generally a tax priority claim under the Bankruptcy Act. This analysis in no way assists in determining whether DOL's Reimbursement Claims are entitled to a tax priority claim under the current Bankruptcy Code.

Even before enacting the Bankruptcy Code, Congress recognized that granting priority to all governmental claims threatened the -integrity of the bankruptcy system:

> As accelerating taxation absorbed greater percentages of the bankrupt's estate, Congress recognized that broad priority classifications hampered the goal of equitable distribution of the estate and penalized general creditors. As a result, the trend of amendments to section 64(a) has been to erode the preferred status of taxes.

Lorber, 675 F.2d at 1067-68.

Lorber also emphasized that the Bankruptcy Code has gone further than the amended Bankruptcy Act in restricting the priority granted to tax claims:

> The revised Bankruptcy Act of 1978 is consistent with this trend. Section 507 ... grants priority status to certain enumerated tax claims. The structure of this statute suggests *a clear intent to limit taxes entitled to priority.*

Id. at 1068 n.5 (emphasis added). *See also* 11 U.S.C. § 507.

Thus, as discussed in more detail below ,*see infra* Point III, even if DOL's Reimbursement Claims are found generally to be a "tax" under the *Anderson-Feiring* test, the Court must still find that the claim is an "excise tax on a pre-petition transaction" before the Reimbursement Claims can be granted priority under Bankruptcy Code § 507(a)(8)(E).[11]

---

[11] While the Bankruptcy Code § 507(a)(8)(E) contains this key distinction from Section 64(a) of the Bankruptcy Act, due to their focus on the Anderson-Feiring test many courts have nonetheless failed to observed Congress' intent to limit taxes entitled to priority under the Bankruptcy Code leaving the old caselaw intact and addressing solely whether the claim asserted was a governmental claim in fact, and therefore, a "tax" entitled to priority. *See eg.*, *Sacred Heart Hospital of Norristown v., Commonwealth of Pennsylvania, Department of Labor and Industry* (*In re Sacred Heart Hospital of Norristown*, 209 B.R. 650 (E.D. Pa. 1997)(granting excise tax priority without identifying relevant transaction); *In re Cottage Grove Hospital*, 265 B.R. 241 (Bankr. D. Or. 2001) (same); *In re Beaman*, 9 B.R. 539 (Bankr. D. Or. 1980) (same). Because these cases fail to identify an underlying prepetition transaction on which the tax is levied as required by the current Bankruptcy Code, they must be ignored in considering whether DOL's Reimbursement Claims should be granted priority under Bankruptcy Code §507(a)(8)(E).

Notwithstanding the questionable utility of the *Anderson-Feiring* line of cases, courts, including the Bankruptcy Court and the District Court here, continue to employ their approach to determine whether a governmental claim is a "tax." As summarized in *Lorber*, the *Anderson-Feiring* approach construes the claim to be a tax when it is: "(a) an involuntary pecuniary burden, regardless of name, laid upon individuals or property; (b) imposed by or under authority of legislature; (c) for public purposes, including the purposes of defraying expenses of government or undertakings authorized by it; (d) under the police or taxing power of the state." *Lorber*, 675 F.2d at 1066.

Recognizing the extreme breadth of this definition, however, and mindful of the trend to limit priorities, *Lorber* and *Suburban II* rejected the *Anderson-Feiring* test and required additional indicia of tax status before characterizing a governmental claim as a tax claim because "all money collected by the Government goes toward defraying its expenses, and is used for public purposes." *Suburban II*, 36 F.3d at 488. As articulated in *Suburban II*, the two additional elements for the government's claim to be considered as a tax are:

> (1) that the pecuniary obligation be universally applicable to similarly situated entities; and (2) that according priority treatment to the government claim [does] not disadvantage private creditors with like claims.

Suburban II, 36 F.3d at 488.

Employing these additional restrictive criteria, the *Suburban II* court determined that the non-tax characteristics of a workers' compensation statute predominated over the statute's tax characteristics and, thus, was held not to be a tax under the Bankruptcy Code. *Id.* at 489. The United States

Supreme Court also recently has acknowledged that a court must engage in a functional analysis and determine whether a government claim is a "tax" based upon "the operation of the provision using the term in question." *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 220 (1996). Thus, the question of whether the DOL Reimbursement Claims are a "tax" hinges upon the operation of N.J.S.A. 43:21-7.2.

. . . .

C. The Reimbursement Obligations Are Not a Tax But a Form of Self-Insurance.

. . .

Several courts recognize that when a government exaction arises from the employer's default in providing self-insurance, the governmental entity's claims more closely resembles a claim for subrogation than a levy for general governmental purposes. *See, e.g. Ohio Bureau of Workers'-Compensation v. Yoder* (*In re Suburban Motor Freight, Inc.*), 36 F.3d 484, 489 (6th Cir. 1994) ("In sum, the non-tax characteristics of Suburban's liability for reimbursement for claims payments predominate over its tax characteristics and the Bureau's claim more closely resembles a subrogation claim than a universally applicable tax."); *In re Park*, 212 13.R. 4302 436 (Bankr. D. Mass. 1997) ("In denying priority status to reimbursement claims, courts have noted the similarity between these claims and subrogation claims."); *In re Payne*, 27 B.R. 809, 817 (Bankr. D. Kan. 1983) (reimbursement obligations "have more substantial non-tax characteristics and are more likened to an assignment of or subrogation to a Tort Claim than a tax").

. . .

E. The Reimbursement Claims Are Not A Tax Because They Only Benefit A Particular Class Of Creditors.

. . .

Other courts likewise have found that worker's compensation reimbursement obligations were not "tax" obligations because the obligations were not applied to the general welfare:

> True, this reimbursement debt is a pecuniary burden imposed by Massachusetts to defray a cost of government. ... The reimbursement burden is not, however, universally applied to all similarly situated constituents. All Massachusetts employers pay WCTF assessments, but only some pay reimbursement claims.... Moreover, reimbursements to the WCTF [state workers' compensation fund] are not revenues applied to the general welfare....

Park, 212 B.R. at 436. *Accord In re Metro Transport Company*, 117 B.R. 143, 154 (Bankr. E.D. Pa. 1990) ("The benefits from the [workers' compensation] Fund are also earmarked for a very specific group: those injured in the workplace whose employers are contributors, to the Fund. Thus, the Fund's charges have very little similarity to a tax.").

. . .

F. The Reimbursement Obligations Are Not A Tax Because They Are Not A Fixed And Predictable Percentage Of Wages Paid.

Another non-tax characteristic of the reimbursement obligations is that it is not assessed at a fixed, predictable rate:

> It is also within common understanding and sense that a "tax" is assessed at a fixed rate. I am unable to think of a "tax," in the ordinary sense of the noun, that is not based on a percentage of something, be it income, sales, corporate capital, or the value of property, a gift or inheritance. Since taxes are always fixed at some rate taxpayers are able to predictably plan their financial affairs by determining in advance what their tax liabilities will be as a result of a particular transaction or event.

In re Freymiller Trucking, Inc., 194 B.R. 914, 915 (Bankr. W.D. Okla. 1996).

. . .

Accordingly, given all the non-tax attributes of the reimbursement obligations set forth above, the Bankruptcy Court and the District Court erred in determining that the Reimbursement Claims were a "tax" even under the *Anderson-Feiring* and *Suburban II* tests.

POINT III

EVEN IF THE REIMBURSEMENT CLAIMS QUALIFY GENERALLY AS A "TAX" THEY DO NOT QUALIFY AS AN EXCISE TAX ON A PREPETITION TRANSACTION ENTITLED TO PRIORITY UNDER THE BANKRUPTCY CODE

. . .

A. The Plain Language of the Bankruptcy Code Must Control.

. . .

Courts have recognized that this statutory provision grants priority only to tax obligations that can, be immediately linked to a discrete transaction undertaken by the debtor within the three years immediately preceding the debtor's petition date. *See In re DeRoche*, 287 F.3d 751-755 (9th Cir. 2002) (multifaceted genesis of workers' compensation claim undermined priority treatment); *In re Templar*, 170 B.R. 562, 564 (Bankr. M.D. Pa. 1994) (holding that status-based or occupation-based excise taxes are not entitled to priority under the Bankruptcy Code).

B. The Bankruptcy Code's Priorities Must Be Narrowly Construed.

The need to identify a discrete prepetition transaction by United is even more critical given that priorities under the Bankruptcy Code are narrowly construed to protect general unsecured creditors:

> In deciding the issues presented in this case, we remain mindful of the admonition that

> "[e]quality of distribution among creditors is a central policy of the Bankruptcy Code." *Begier v. Internal Revenue Serv.*, 496 U.S. 531, 58), 110 S.Ct. 2258, 2263, 110 L.Ed.2d 46 (1990). Thus, *priority claims must be carefully limited since every such claim reduces the fund available to general creditors*. For this reason, "creditors must directly tie their priority claims to specific provisions of the Bankruptcy Code." *Suburban 1*, 998 F.2d at 342.

Suburban 11, 36 F.3d at 487 (emphasis added). *Accord In re Metro Transp. Co.*, 117 B.R. 1437 154 (Bankr. E.D. Pa. 1990) ("there is a presumption in bankruptcy cases ... that the debtor's limited resources will be equally distributed among his creditors [causing] statutory priorities [to be] narrowly construed.").[12]

C. Excise Taxes Traditionally Are Imposed on the Manufacture, Sale or Use of Goods.

Because the Bankruptcy Code does not define "excise tax," courts have turned to other sources, each of which confirms that excise taxes have almost uniformly been levied on discrete, one-time transactions. In *In re Marcucci*, 256 B.R.

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[12] The priority treatment is material here. If DOL's Reimbursement Claims are priority claims, United's unsecured creditors will recover less than twenty-four percent (24%) of their unsecured claims. But, if the DOL's Reimbursement Claims are treated as unsecured, non-priority claims, as argued by the Reconstituted Committee, unsecured creditors (including the DOL) will recover approximately thirty-six percent (36%) of their unsecured claims.

685, 696,(D.N.J. 2000), the District Court for the District of New Jersey adopted the Black's Law Dictionary definition of excise tax, commenting that "[t]raditionally, excise taxes have been recognized as taxes imposed on the manufacture, sale, or use of goods (such as a cigarette tax), or on an occupation or activity (such as a license tax or an attorney occupation fee)." *Marcucci*, 256 B.R. at 296 (citing Black's Law Dictionary) . *Cf. Templar*, 170 B.R. at 564 (recognizing the long line of cases that have adopted the Black's Law Dictionary definition and citing *In re Groetken*, 843 F.2d 1007, 1013 (7th Cir. 1988); *In re Rosenow*, 715 F.2d 277, 279 (7th Cir. 1983); *In re Chateaugay Corp.*, 153 B.R. 6,32, 638 (Bankr. S.D.N.Y. 1993); *In re Tri-Manufacturing and Sales Co.*, 82 B.R. 58, 60 (Bankr. S.D. Ohio 1988); *In re Tapp*, 16 B.R. 315, 322 (Bankr. D. Alaska 198 1)).

. . . .

Other courts have reached similar conclusions. For example, in *In re Park*, 212 B.R. 4A 434 (Bankr. D. Mass. 1997), which *Marcucci* found persuasive, the court noted that "[e]xcise taxes have traditionallybeen imposed on alcohol, tobacco, fuel, and luxuries and include sales taxes, estate and gift taxes, wagering and truck taxes." *Marcucci*, 256 B.R. at 696. *Accord In re DeRoche*, 287 F.3d 751, 755 (9th Cir. 2002) ("A fundamental characteristic of a typical excise tax is that it is a discrete,, one-time tax based on a single act by the person or entity taxed, such as a sale or an application for a license.").

. . .

F. The Workers Compensation Analogy Also Demonstrates the Need for a Discrete Pre-Petition Transaction.

The workers' compensation cases DOL cited to the District Court, *In re Olga Coal Co.*, 194 B.R. 741 (Bankr. S.D.N.Y. 1996); *In re Hynes*, 229 B.R. 405 (Bankr. W.D. Mich. 1998);

In re Voightman, 239 B.R. 380 (8th Cir. B.A.P. 1999); *In re Camilli*, 94 F.3d 1330 (9th Cir. 1996); *In re Hutchinson*, 135 B.R. 890 (Bankr. D. Ariz. 1992), also fail to provide a basis for granting United's Reimbursement Obligations priority status.

Despite the superficial resemblance between the obligation to reimburse a workers' compensation fund and the obligation to reimburse an unemployment compensation fund, none of the cases cited by the DOL are apposite to the issue before this Court. Only the Bankruptcy Court for the Southern District of New York in *Olga* and the Bankruptcy Appellate Panel for the Eighth Circuit in *Voightman* even attempted to link the reimbursement obligation at issue to a discrete prepetition transaction. *See Hynes*, 29 B.R. at 409 (failing to identify an underlying prepetition. transaction); *Camilli*, 94 F.3d at 1331 (same); *Hutchinson*, 135 B.R. at 891 (same). In *Olga* and *Voightman*, however, there was a clear pre-petition trigger -the transaction which caused injury to the worker. In contrast, courts that have considered a debtor's obligation to reimburse an unemployment compensation fund have been unable to identify any prepetition transaction that triggers the liability of the debtor.

Supreme Court, U.S.
FILED
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No. 04-1487

IN THE

Supreme Court of the United States

STATE OF NEW JERSEY, DEPARTMENT OF LABOR,

Petitioner,

v.

RECONSTITUTED COMMITTEE OF UNSECURED CREDITORS OF UNITED HEALTHCARE SYSTEM, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Page

Table of Cited Authorities iii

Summary of Argument 1

Argument 2

I. LIKE DOL, THE *AMICI CURIAE* FAIL TO DEMONSTRATE THAT THERE IS A SPLIT IN THE CIRCUITS JUSTIFYING THE PETITION. 2

A. The *Amici Curiae* Admit that the Only Two Circuits to Address a Non-Profit's Reimbursement Obligation under FUTA Have Reached the Same Holding that the Reimbursement Obligation is not a Tax. 2

B. The Other Federal Circuit Court Decisions Cited by the *Amici Curiae* Involve Assessments under Other Statutory Schemes and do not Demonstrate any Split among the Circuits Concerning the Bankruptcy Code's Treatment of a Non-Profit's Reimbursement Obligation. 3

Contents

Page

II. THE *AMICI CURIAE*'S BRIEF ALSO DEMONSTRATES THAT ANY DEFAULT BY BANKRUPT NON-PROFIT CORPORATIONS TO PAY THE REIMBURSEMENT OBLIGATION HAS A NEGLIGIBLE IMPACT ON THE FUTA SYSTEM. 5

Conclusion 7

TABLE OF CITED AUTHORITIES

Page

CASES

County Sanitation Dist. No. 2 v. Lorber Indus. (In re Lorber Indus.), 675 F.2d 1062 (9th Cir. 1982) 3

Indus. Comm'n v. Camilli (In re Camilli), 94 F.3d 1330 (9th Cir. 1996) 3

LTV Steel Company v. Shalala (In re Chateaugay Corp.), 53 F.3d 478 (2d Cir. 1995) 4

Massachusetts Division of Employment & Training v. Boston Regional Medical Center, Inc. (In re Boston Regional Medical Center, Inc.), 291 F.3d 111 (1st Cir. 2002) 2, 3, 5

New Neighborhoods, Inc. v. West Virginia Workers' Compensation Fund, 886 F.2d 714 (4th Cir. 1989) 4

Ohio Bd. of Workers' Comp. v. Yoder (In re Suburban Motor Freight, Inc.), 36 F.3d 484 (6th Cir. 1994) 3

United Mine Workers of America 1992 Benefit Plan v. Rushton (In re Sunnyside Coal Co.), 146 F.3d 1273 (10th Cir. 1998) 4

Cited Authorities

Page

United States v. Juvenile Shoe Corp. (In re Juvenile Shoe Corp.), 99 F.3d 898 (8th Cir. 1996) 4

Williams v. Motley, 925 F.2d 741 (4th Cir. 1991) 4

MISCELLANEOUS

U.S. Department of Labor, Employment and Training Administration (DOLETA) 5

BRIEF OF RESPONDENT IN RESPONSE TO BRIEF OF PENNSYLVANIA *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

SUMMARY OF ARGUMENT

1. Like the New Jersey Department of Labor ("DOL"), the *Amici Curiae* have not established a split among the United States Courts of Appeal that justifies granting DOL's Petition for a Writ of Certiorari (the "Petition"). The two Circuit Courts of Appeal that have confronted the legal issue presented in this case each agree that a non-profit employer's reimbursement obligation under unemployment compensation law is not entitled to priority treatment in bankruptcy. No Federal circuit decision cited by the *Amici Curiae* disagrees with these holdings by the First and Third Circuits and, thus, there is no split among the circuits on this issue.

2. In their effort to create an "important federal question," the *Amici Curiae* also overstate the impact of any failure of non-profit corporations to pay the reimbursement obligation on the financial health of the Federal unemployment compensation system created by the Federal-State Unemployment Tax Act, codified at 26 U.S.C. § 3301, *et seq.* ("FUTA"). Indeed, the very facts and figures presented by the *Amici Curiae* demonstrate that any defaults by bankrupt non-profit corporations in paying the reimbursement obligation has had a negligible impact on the unemployment compensation system and is not a sufficiently "important federal question" warranting the grant of the Petition.

ARGUMENT

I. LIKE DOL, THE *AMICI CURIAE* FAIL TO DEMONSTRATE THAT THERE IS A SPLIT IN THE CIRCUITS JUSTIFYING THE PETITION.

A. The *Amici Curiae* Admit that the Only Two Circuits to Address a Non-Profit's Reimbursement Obligation under FUTA Have Reached the Same Holding that the Reimbursement Obligation is not a Tax.

The *Amici Curiae* cannot show any conflict between the only two United States Courts of Appeal to address the bankruptcy priority of the Reimbursement Obligation[1] under unemployment compensation law. The *Amici Curiae* readily admit that the Third Circuit in this case and the United States Court of Appeals for the First Circuit in *Massachusetts Division of Employment & Training v. Boston Regional Medical Center, Inc. (In re Boston Regional Medical Center, Inc.)*, 291 F.3d 111 (1st Cir. 2002) ("*Boston Regional I*") reached the same conclusion: that a non-profit employer's Reimbursement Obligation under the unemployment compensation law is not a tax. Brief of Amici Curiae in Support of the Petition for Writ of Certiorari ("Amici Br.") 9 ("[T]he Third Circuit in this case, as well as the First Circuit, . . . have held that similar [reimbursement] claims are not taxes, but are instead ordinary debts owed to the State.").

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[1] Capitalized terms not defined herein shall have the meanings attributed to them in the Respondent's Brief in Opposition ("Resp. Br.").

B. The Other Federal Circuit Court Decisions Cited by the *Amici Curiae* Involve Assessments under Other Statutory Schemes and do not Demonstrate any Split among the Circuits Concerning the Bankruptcy Code's Treatment of a Non-Profit's Reimbursement Obligation.

Unlike the instant case and *Boston Regional I*, none of the *Amici Curiae*'s circuit court decisions involve the Reimbursement Obligation of any unemployment compensation law or the exemption from the compulsory, contributory quarterly tax on payroll provided to non-profit employers by the unemployment compensation statutes. Each of the cases cited by the *Amici Curiae* arises under different statutes with different public objectives. Importantly, none of these different statutory schemes provide non-profit corporations with an option to elect treatment different from that of other persons subject to the applicable statutory schemes.

Three of the decisions cited by the *Amici Curiae* were also cited by DOL and are already discussed at length in Respondent's Brief in Opposition. Resp. Br. 10-12 (discussing and distinguishing *Indus. Comm'n v. Camilli (In re Camilli)*, 94 F.3d 1330, 1333 (9th Cir. 1996), *Ohio Bd. of Workers' Comp. v. Yoder (In re Suburban Motor Freight, Inc.)*, 36 F.3d 484, 486 (6th Cir. 1994) ("*Suburban II*"), and *County Sanitation Dist. No. 2 v. Lorber Indus. (In re Lorber Indus.)*, 675 F.2d 1062, 1064-65 (9th Cir. 1982)).

The other five cases cited by the *Amici Curiae* do not establish a split in the circuits because they involve wholly-different statutory schemes such as: (a) the Federal Coal

Industry Retiree Health Benefit Act of 1992, which imposed an obligation on present or former employers of members of the United Mine Workers Union to pay retiree and health benefits to former mine workers and their spouses, *LTV Steel Company v. Shalala (In re Chateaugay Corp.)*, 53 F.3d 478, 498 (2d Cir. 1995); *United Mine Workers of America 1992 Benefit Plan v. Rushton (In re Sunnyside Coal Co.)*, 146 F.3d 1273, 1280 (10th Cir. 1998); (b) Federal pension law which, pursuant to 26 U.S.C. § 4980, imposed a flat tax on that portion of an over-funded employee pension plan which reverts to the employer after payment of all employee benefits required by the plan, *United States v. Juvenile Shoe Corp. (In re Juvenile Shoe Corp.)*, 99 F.3d 898, 901 (8th Cir. 1996); (c) Virginia's motor vehicle law which imposed a surcharge upon operators of uninsured motor vehicles, *Williams v. Motley*, 925 F.2d 741, 743-44 (4th Cir. 1991); and (d) West Virginia's workers' compensation statutes which imposed an assessment against employers for premiums to be paid to the workers' compensation fund. *New Neighborhoods, Inc. v. West Virginia Workers' Compensation Fund*, 886 F.2d 714, 720 (4th Cir. 1989).

Because the Third Circuit's decision is consistent with the only other circuit court to actually address the Reimbursement Obligation of the unemployment compensation statute, and because the other cases cited by the *Amici Curiae* do not involve a Reimbursement Obligation or the FUTA-mandated exemption through which a non-profit corporation can choose a Reimbursement Obligation in lieu of the contributory tax on payroll, there is no foundation to conclude that there is a split among the Federal circuits' holdings on this issue warranting the granting of the Petition.

II. THE *AMICI CURIAE*'S BRIEF ALSO DEMONSTRATES THAT ANY DEFAULT BY BANKRUPT NON-PROFIT CORPORATIONS TO PAY THE REIMBURSEMENT OBLIGATION HAS A NEGLIGIBLE IMPACT ON THE FUTA SYSTEM.

The *Amici Curiae* also fail in their effort to create an "important federal question."[2] Their own facts and figures demonstrate that any default by bankrupt, non-profit employers in paying the Reimbursement Obligation has had a negligible impact on the funding of the FUTA system.

By the *Amici Curiae*'s own reckoning, the FUTA tax credits to employers nationwide was $46.4 *billion* in 2003. Amici Br. 5-6 (citing FUTA Receipts versus Amounts Returned for Fiscal Year 2003, U.S. Department of Labor, Employment and Training Administration (DOLETA)). Yet the seven reported decisions on this issue cited by the *Amici Curiae*, Amici Br. 4-5, span almost ten years and represent a total default by the non-profit corporations of only slightly more than $26 *million*.[3] This represents less than 0.06% of the total value of FUTA tax credits received by employers nationwide. Likewise, this total obligation is but a drop in the $1.5 *trillion* bucket of the States' FUTA indebtedness to the Federal government. Amici Br. 6. This minute financial obligation clearly lacks the importance of

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[2] Significantly, the Massachusetts Attorney General, now joining the *Amici Curiae*, was the appellant in *Boston Regional I*, but did not petition this Court for Certiorari in that case because it presented an "important federal question."

[3] The exact figure is $26,077,000.

the question which the *Amici* suggest that this Court should consider.[4]

Because the actual amount of the Reimbursement Obligations that bankrupt non-profit employers may owe to the States is negligible when compared to the value of FUTA tax credits received by employers nationwide and the States' indebtedness to the Federal government under the unemployment compensation program, the issue presented by the Third Circuit's decision is not of significant importance to warrant granting the Petition.

---

[4] Additionally, like DOL, the *Amici Curiae* ignore the recovery that the Reimbursement Obligation will receive even if it does not garner priority. For example, here, if the Third Circuit's decision stands, DOL will receive over 30% of its Reimbursement Claims as a general unsecured creditor of United.

CONCLUSION

For the reasons set forth herein, as well as those set forth in Respondent's Brief in Opposition, DOL's Petition for Certiorari should be denied.

Respectfully submitted,

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